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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,	)	Case No. 07-cv-02132-DMS-AJB
	)	
Plaintiff,	)	Judge: Dana M. Sabraw
	)	Mag. Judge: Anthony J. Battaglia
-against-	)	
	)	<b>MEMORANDUM OF POINTS</b>
NATIONWIDE RECOVERY SYSTEMS, LTD.,	)	<b>AND AUTHORITIES IN</b>
	)	<b>SUPPORT OF MOTION TO</b>
Defendant.	)	<b>STAY AND/OR FOR</b>
	)	<b>PROTECTIVE ORDER</b>
	)	
	)	Date: N/A
	)	Time: N/A
	)	Courtroom: N/A
	)	

**I. INTRODUCTION**

Defendant, Nationwide Recovery Systems, Ltd. ("NRS"), submits this memorandum in support of its Motion to Stay and/or for Protective Order.

1           The Court should stay discovery in these consolidated cases filed by plaintiff, James  
2 M. Kinder, until further orders from this Court. As described in previous filings, *for over 10*  
3 *years*, plaintiff has made a business of being a professional plaintiff by improperly filing  
4 lawsuits under the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227.  
5 Every court which has ruled on plaintiff’s TCPA claims, including this Court in *James M.*  
6 *Kinder v. Associates Housing Finance, LLC, et al.*, Case No. 99-02411 (S.D. Cal. 1999)  
7 (Jones, J.), has dismissed the claims. *See* Exhibit A, *Associates Housing Finance*. Within the  
8 next 45 days, NRS intends to file a motion to dismiss plaintiff’s remaining claims. No  
9 discovery will be necessary in order for plaintiff to respond to NRS’s dispositive motion.  
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11           In light of this Court’s ruling in *Associates Housing Finance*, and other legal  
12 deficiencies related to plaintiff’s claims, the Court should stay discovery in these consolidated  
13 cases, until the Court rules on NRS’s soon to-be-filed dispositive motion. By staying  
14 discovery in these cases, this Court can ensure that none of the parties are placed in the unfair  
15 position of having to respond to or issue unnecessary, expensive, and time-consuming  
16 discovery in a case involving claims this Court has previously dismissed. (Notably, the relief  
17 NRS seeks here is no different than the relief granted by Judge Ronald L. Styn in the  
18 consolidated *Kinder* lawsuits, currently pending in state court. On February 1, 2008, Judge  
19 Styn consolidated the approximately 185 *Kinder* lawsuits and stayed the litigation entirely,  
20 including all discovery, until the court rules upon the defendants’ soon to-be-filed motion.  
21 Undersigned counsel in this action was designated as defense liaison/coordinating counsel in  
22 the state court litigation.)  
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## II. PROCEDURAL HISTORY AND FACTS

Plaintiff's TCPA claims relate to telephone calls made to number 619-999-9999 (the "9 Number"), which is allegedly the telephone number assigned to plaintiff's paging service. *See* Docket No. 1, Complaint. As noted by this Court in *Associates Housing Finance*, "many companies use the number 999-9999 as a default number in their computer records for new customers without a phone number or for existing customers whose recorded number has become defunct." Exhibit A, *Associates Housing Finance*, at p. 2, Ins. 13-15.

Currently, there are 7 *Kinder* lawsuits pending in this Court, including:

1. *James M. Kinder v. Bankfirst*, Case No. 07-00877;
2. *James M. Kinder v. Asset Acceptance, LLC*, Case No. 07-02084;
3. *James M. Kinder v. Astra Business Services, Inc.*, Case No. 07-02091;
4. *James M. Kinder v. Nationwide Recovery Systems, LTD*, Case No. 07-02132 [this case];
5. *James M. Kinder v. Discover Card Services, Inc.*, Case No. 07-02138;
6. *James M. Kinder v. Enhanced Recovery Corporation*, Case No. 07-02152; and
7. *James M. Kinder v. Harrah's Entertainment, Inc.*, Case No. 07-02226.

On December 26, 2007, pursuant to Fed. R. Civ. P. 42, NRS filed a Motion for Consolidation of Actions. *See* Docket No. 14. On February 4, 2008, the Court granted NRS's consolidation motion. *See* Docket No. 28. Per the Court's order, this case was designated the "lead case." *Id.* Further, per the Court's order, all future filings in any of the cases must include the lead case number and caption and must be docketed in this case. *Id.*

Plaintiff asserts 2 TCPA claims. *See* Docket No. 1, Complaint. First, plaintiff alleges NRS violated the TCPA by calling his "number assigned to a paging service, using an automatic telephone dialing system and/or an artificial or prerecorded voice[.]" *Id.* at ¶ 8. Second, plaintiff alleges NRS violated the TCPA and 47 C.F.R. § 64.1200 by failing to

1 include in its “prerecorded telephone messages” NRS’s business name and telephone number.  
 2 *Id.* at ¶¶ 9-12.

3 On December 5, 2007, NRS filed a Motion for Partial Judgment on the Pleadings. *See*  
 4 Docket No. 7. NRS’s motion related to plaintiff’s second claim that NRS violated the TCPA  
 5 and 47 C.F.R. § 64.1200 by failing to include in its “prerecorded telephone messages” NRS’s  
 6 business name and telephone number. *Id.* On January 23, 2008, the Court granted NRS’s  
 7 motion and dismissed this claim. *See* Docket No. 22.

9 Following the Court’s January 23, 2008 order, the only remaining claim is that NRS  
 10 allegedly violated the TCPA by calling his 9 Number through the use of “an automatic  
 11 telephone dialing system and/or an artificial or prerecorded voice[.]” *Most notably*, this Court  
 12 has already ruled on the merit of this claim in *Associates Housing Finance*. In *Associates*  
 13 *Housing Finance*, this Court ruled that the same type of calls made here—calls made with a  
 14 “predictive dialer”—do *not* fall within the restrictions set forth in the TCPA. *See* Exhibit A,  
 15 *Associates Housing Finance*, at p. 7, Ins. 19-21. The Court held that a “predictive dialer is *not*  
 16 an automatic telephone dialing system as defined by section 227(a)(1)(A)-(B).” *Id.* (emphasis  
 17 added).  
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### 19 **III. LAW AND ARGUMENT SUMMARY**

20 “The Court has broad discretion in controlling the timing of discovery.” *Dibel v.*  
 21 *Jenny Craig, Inc.*, 2007 WL 2220987, \*1 (S.D. Cal. 2007); *see also WebSideStory, Inc. v.*  
 22 *NetRatings, Inc.*, 2007 WL 1120567, \*1 (S.D. Cal. 2007) (same). “Additionally, the Federal  
 23 Rules, by their plain terms, allow the court to limit discovery so as to avoid cumulation,  
 24 duplication, harassment, expense and burdensomeness.” *WebSideStory*, 2007 WL 1120567 at  
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1 \*1. Under Fed. R. Civ. P. 26(c), a “party may seek a protective order in the court where the  
 2 action is pending requesting an order ‘that the disclosure or discovery not be had.’” *Lucent*  
 3 *Technologies, Inc. v. Gateway, Inc.*, 2008 WL 183637, \*2 (S.D. Cal. 2008). Specifically,  
 4 Rule 26(c) provides:

5 A party or any person from whom discovery is sought may move for a  
 6 protective order in the court where the action is pending . . . . The motion must  
 7 include a certification that the movant has in good faith conferred or attempted  
 8 to confer with other affected parties in an effort to resolve the dispute without  
 9 court action. The court may, for good cause, issue an order to protect a party  
 or person from annoyance, embarrassment, oppression, or undue burden or  
 expense, including one or more of the following:

10 (A) forbidding the disclosure or discovery;

11 (B) specifying terms, including time and place, for the disclosure or discovery;

12 . . . .

13 Fed. R. Civ. P. 26(c).

14  
 15 “[A court] has broad discretion to stay discovery pending decision on a dispositive  
 16 motion.” *Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985); *see*  
 17 *also Quair v. Bega*, 2005 WL 552537, \*2 (E.D. Cal. 2005) (same). As one court has noted,  
 18 “[a] decision to prevent unnecessary discovery because the case could well be decided on the  
 19 parties’ motions is not, on its face, fundamentally unfair to a party desiring discovery.”  
 20 *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1304 n. 13 (5th Cir. 1983).  
 21 For example, “[a] district court may . . . continue to stay discovery when it is convinced that  
 22 the plaintiff will be unable to state a claim for relief.” *Wood v. McEwen*, 644 F.2d 797,  
 23 801 (9th Cir. 1981); *see also Seven Springs Ltd. Partnership v. Fox Capital Management*  
 24 *Corp.*, 2007 WL 1146607, \*1 (E.D. Cal. 2007) (“The court may, for example, stay discovery  
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1 when it is convinced that plaintiff will be unable to state a claim for relief or if the action is  
 2 moot.”). The Fifth Circuit has explained why such discovery stays are appropriate:

3 [A]s we have seen, the disposition of this summary judgment motion  
 4 terminated the lawsuit without putting the parties to the expense of conducting  
 5 broad discovery on all issues raised in the complaint. We have constantly  
 6 emphasized the broad discretion which a district judge may properly exercise  
 7 in discovery matters. On these facts, we see no possible abuse of discretion in  
 the order staying general discovery until the court could determine whether the  
 case would be resolved at the summary judgment stage.

8 *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976) (citation omitted); *see also*  
 9 *Jackson v. Northern Telecom, Inc.*, 1990 WL 39311, \*1 (E.D. Pa. 1990) (“[I]n the interest of  
 10 judicial economy, and with a view toward preventing possibly unnecessary and expensive  
 11 discovery, this court will grant defendants’ motion to stay discovery.”); *Corwin v. Marney,*  
 12 *Orton Investments*, 843 F.2d 194, 200 (5th Cir. 1988) (“It would be wasteful to allow  
 13 discovery on all issues raised in a broad complaint when, for example, the case will not reach  
 14 trial because of the expiration of a limitations period.”).

15  
 16 **A. The Court Should Stay Discovery, Until Further Orders From This Court**

17 Within the next 45 days, NRS intends to file a motion to dismiss plaintiff’s remaining  
 18 claims. As noted, this Court has already ruled upon the merit of plaintiff’s remaining claims  
 19 in *Associates Housing Finance*. See Exhibit A, *Associates Housing Finance*. Considering  
 20 this Court’s prior ruling, and other legal deficiencies regarding plaintiff’s claims, the Court  
 21 should stay all discovery in these consolidated cases, until the Court rules on NRS’s soon to-  
 22 be-filed dispositive motion. By staying discovery, the Court can manage this litigation  
 23 efficiently “and with a view toward preventing possibly unnecessary and expensive  
 24 discovery[.]” *Jackson*, 1990 WL 39311 at \*1. As noted above, on February 1, 2008, Judge  
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1 Styn stayed the consolidated *Kinder* lawsuits pending in state court, until the defendants'  
2 motion is ruled upon. NRS requests that this Court do the same here.

3 **IV. CONCLUSION**

4 The Court should grant NRS's Motion to Stay and/or for Protective Order and stay all  
5 discovery in these consolidated cases, until further orders from this Court.

6  
7 Dated: February 11, 2008

**Sessions, Fishman, Nathan & Israel, L.L.P.**

8  
9 /s/ Debbie P. Kirkpatrick

Debbie P. Kirkpatrick

Attorney for Defendant,

Nationwide Recovery Systems, Ltd.

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11 N:\Nationwide Recovery Systems Ltd (8949)\Kinder, James (8949-07-22323)\Motion to Stay\Memo in Supp. Motion to Stay.doc